

Richmond Journal of Law and Technology

Volume 8 | Issue 1

Article 6

2001

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Joe T. May, *Remarks on the Background and Development of UCITA*, 8 Rich. J.L. & Tech 4 (2001).
Available at: <http://scholarship.richmond.edu/jolt/vol8/iss1/6>

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Volume VIII, Issue 1,
Fall 2001

Remarks on the Background and Development of UCITA

by: Joe T. May[*]

Cite As: Joe T. May, *Remarks on the Background and Development of UCITA*, 8 RICH. J.L. & TECH. 4 (Fall 2001) at <http://www.jolt.richmond.edu/v8i1/article4.html>.

{1}I'm Delegate Joe May, and I represent the 33rd House of Delegates District which is far Northern Virginia. I should tell you before we start I'm not an attorney by profession. I'm an electrical engineer with grease under the fingernails to prove it. In fact, I own an electronic manufacturing and engineering firm. And to paraphrase Polonius, I am neither a borrower nor lender of software. I do purchase some, we do sell some. So hopefully my perspective is a little more balanced than it might first appear. I'm going to talk today about the chronology of events that led up to our present situation with regard to the UCITA, Uniform Computer Information Transactions Act, legislation.

{2}For me and the Virginia General Assembly it really started back in July 1999 when a technical advisory committee, which is part of the Joint Commission of Technology and Science, which I also chair, had its first look at UCITA. And our charge was to look at the whole public hearings on it to review it for the possibility, and I emphasize the possibility, of introducing it as legislation in the 2000 session of the General Assembly. I'd have to be honest and say that my first reaction was "too much, too quick", and I wasn't overly optimistic at all about ending up with a piece of legislation that could be submitted to the General Assembly. But, as time went on, it began to evolve.

{3}And just to look through the chronology of events our Joint Commission created a technical advisory committee to review and make possible suggestions to the proposed legislation that had been submitted by NCCUSL. That's the National Commission of Commissioners for Uniform State Laws. The Committee, the

Technical Advisory Committee, was comprised of 27 people and there were a number of attorneys; there were librarians; there were software users; and there were software vendors. There was a host of different perspectives represented on the Committee. The way we dealt with UCITA was simply to sit down with all twenty-seven members around the table with the co-chairman--I co-chaired the Committee with Delegate Allen Diamondstein, who is an attorney from the Newport News area--and we went through the proposed legislation line-by-line, section-by-section and said, "OK, read this Mr. Ring" in a number of cases. And, [he] was asked to tell us what they had in mind when they wrote that particular section. And because there are a number of people, like me, who were not attorneys, but who were quite familiar with the computer world we asked that we use tangible examples of just what this language meant. And, as we went through line-by-line, item-by-item, if everybody was in agreement that this sounded acceptable, we would move on to the next. Periodically, we would come to a point where we either didn't understand or couldn't agree, and the Committee would vote on whether or not to accept the language as is, or to amend the language. This started in July 1999. I guess we had approximately twenty hours of public hearings in which members of the public who had interest in the process. And that ranged from consumers to vendors. By the way there were consumer representatives on the Technical Advisory Committee, as well.

{4}In any event, after some twenty hours or so of public hearings, we finally ended up with a piece of legislation that looked like it was probably worthy of being submitted to the 2000 session of the General Assembly. For those of you who are familiar with the General Assembly, you probably know what happened next. But for those of you who are not, the proposed legislation of the Technical Advisory Committee was recommended to the Joint Commission on Technology and Science, which I happen to chair, and the Commission decided what, if any, they were going to submit to the General Assembly. The Commission made a few changes to what the Technical Advisory Committee had recommended and then submitted the UCITA bill to the General Assembly. From there we recommended the House Science and Technology Committee, and, of course, it is the Committee system which really makes the General Assembly run. If you don't make it through the Committee, you don't make it. And if you limp through there, you're in difficulty very, very likely when you arrive on either the House or the Senate floor. In any event, we got it through the House Science and Technology Committee who then referred to another committee, the Committee of Corporations, Insurance and Banking, and I think their perspective is intended to be a little more from a business standpoint. But it came out of there, and went to the House floor and low and behold it passed handily, 95 to 2.

{5}But it still was not a stable situation. There was still a great deal of difficulty involved particularly in the area of simply understanding what it meant, and I have to be honest and say that several of the misunderstandings I think were a result of not ever having the individual read the Bill. In fact, at one point I actually considered requiring an oath from anyone appearing in front of the Committee to say: "Yes, I have read the legislation, and I think I am prepared to comment on it." We had a series of issues, among them [that] this would somehow change the licensing arrangement. That you used to be able to buy software, and now this is going to make you license it. Well, you've been licensing software for as long as you have been making use of software, and it took quite a long time to beat that down because this is really about licensing of software. If you buy software, you're probably not going to like the price if it's anything that is distributed very widely because we pay a huge tab to have a piece of software that has your name on it and no one else can use. But licensing is one issue. Self-help is another one which really gave people a lot of difficulty. It was seen as giving the individual, excuse me the licensor, the right to get into your computer and shut it down at will whenever he saw fit, and actually there was a great deal of talk about backdoors and the computer hostage and so on and so forth. And that was one of the changes that got made in the 2000 legislation. What we did do was require that an individual, or excuse me a licensor, wait 45 days before he invoked any sort of self-help. And self-help is not the variety where you come into a backdoor through a hidden telephone line and shut down the computer. It's a great deal more civilized than that, and, by the way, the law was mute on any such activity prior to that time. So we finally put a dimension to what you could or could not do. In any event we were still, we passed the House fairly nicely. We went to the Senate. There were some additional

hearings on it, but low and behold at the end of the 2000 session we had a UCITA bill. And frankly one of the first in the nation, if not the first.

{6}It wasn't quite the end of the story, however. There was in the Bill, and in an adjoining resolution, the requirement that first of all there be delayed enactment. The Bill was signed into law, but it didn't become effective until July 2001. Secondly, that the bill was to be reviewed by the Technical Advisory Committee during the off season during the year 2000 to determine what impacts, if any, it might have on businesses, libraries, consumers, and what have you. So bright and early in June or July 2000, we created a second Technical Advisory Committee to hold public hearings to consider amendments to the existing law. We were basically conceding that while we thought we had a reasonable bill, there were probably ways in which to make it better. This time we were a lot more scientific about how we chose our Technical Advisory Committee. We actually accepted applications for it, and received 70 plus applications. From that we selected 27 members, and we tried very hard to make it geographically diverse and interest diverse because we had insurance companies, we had consumer representatives, we had law professors, we had writers of software, we had users of software. I must say that our balance was pretty good because after we looked at some 70 plus proposed amendments to the Bill a great number of them were accepted or rejected on very close votes. We made a very real effort to try to get as good a balance as we could because after all the objective of the Bill in the first place is to establish the legal framework for conducting computer-type business, and again to paraphrase Polonius, neither a borrower or lender be. I, we, didn't wish to favor either licensor or licensee.

{7}We were trying to come up with an even-handed piece of legislation that would simply enhance commerce and certainly not to favor the licensor or the licensee, and therein lay some difficulty. Anytime that you have a piece of legislation that involves huge amounts of resources, read money, you're going to have some differences of opinion because one side wants one, one side wants the other and our task was to make it as evenly balanced as we could. During the year 2000 session, we conducted five different public hearings throughout the state, Hampton Roads, Lynchburg, Richmond, Northern VA, and created some 25 hours of, literally knock-em-down, drag-them-out in some cases, public hearings. We ended up with 23 amendments to the Bill as passed through the 2000 General Assembly.

{8}Of the 23 amendments, really only about four areas were what I would consider really serious sorts of things. One [was] consumer protection. The consumer protection part needed some assistance which came from both the Attorney General's office and, of course, from the Virginia Consumer Counsel and a lot of members of the Committee. So consumer protection was addressed. Certainly, electronic self help was addressed. One of the things we did, and it's in part consumer, was to make certain that self help didn't apply to the mass market licensing. If you're an individual and you pay \$28 for your Rand McNally atlas, they probably can't get into your computer and shut you down if you haven't paid for it. Frankly I'm not sure it's all that big a potential problem. But we did address it. One of the other areas that had been very hotly debated in the 1999 area was the area of mass market licenses and whether or not clicking on the box that says "I accept" was adequate. Basically mass market licenses were pretty well exempted from anything that even remotely put the individual in the situations where you were accepting something sight unseen. All along they have the right to return the piece of software if they didn't like it, but this made the protection a little more adequate. One area that we nearly stepped into, and I'm certainly glad we did not, was the area of transferability licenses. Originally we had concluded that it was desirable to allow you to transfer licenses freely once you had paid the necessary fees, and one of the committee members pointed out that that's contrary to the existing law. One of our real challenges in this whole business was trying to take the law as written under UCC for tangible goods and translating it into intangible goods in the computer domain. We ultimately ended up with a compromising transferability. Basically we stuck with the traditional contract law where if you have a system and you sell it to someone or give it to someone or acquire it or what have you, it is necessary for the acquirer to renegotiate the license with the licensor. There are certain exceptions to that primarily looking toward the ability for let's say a company to give computers to a non-profit organization, to another individual, that sort of thing where you would not normally expect to run into licensing difficulty. And one

last area was in regard to libraries. The libraries felt particularly put upon by the first version of the Bill, and indeed I had to agree with them. And thanks to Mr. Ring and a number of other people they labored long and hard and finally were able to come up with a compromise in which the libraries receive substantially broader rights having to do with the electronic media that they receive and work with. In the 2001 session that was probably one of the hottest contested items we had.

{9}In any event, in 2001 we came back with the amended Bill, 23 amendments to it, and I'll ask Mr. Ring or others to speak to it a little later. We zipped right through the House into the Senate. As is usual in the General Assembly we ended up on the last day with one little amendment which I've asked the Governor to attach to it, but it is really making it agree with the Virginia Consumer Protection Act, as a matter of making UCITA and that Act correspond with each other. In summary, it is probably the toughest piece of legislation I've ever dealt with. I must say the Technical Advisory Committees were very, very good. They paid the best attention, did their homework as well or better than any group I've every chaired. And I must say it was intellectually stimulating which is not to say it was always fun. But overall I think what we ended up with was a very balanced bill. It is as balanced as I know how to make it, as we know how to make it. Do I expect there to be some additional changes? Maybe a few, but not too many. I really believe that we are pretty well where we need to be. We do expect the bill to become a model for other states to follow in the time to come. I am in pretty regular contact with other states who are asking about our experience and where we expect to go from here. With that I'll say that here we are. We have UCITA in place. It has been groomed, curried, and stroked, and it becomes effective July 1, 2001. Thank you.

ENDNOTES

[*]Delegate Joe T. May, known as the resident technology expert in the Virginia General Assembly, is currently serving his fourth term in the House of Delegates. May serves as co-chairman of the Science and Technology committee, is chairman of the Joint Commission on Technology and Science, is co-chairing a technical advisory committee that is formulating new e-commerce laws for the Commonwealth, and is a member of the Governor's Commission on Information and Technology. Delegate May, a registered professional engineer who holds 17 patents, is founder and CEO of the Virginia based electronic engineering and manufacturing firm, (EIT). May also serves as a member of the Virginia House of Delegates' Appropriations, Transportation, General Laws and Interstate Cooperation committees.

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